SUPREME COURT, U. S.

JUL 10 1957

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 347

MALCOLM ROBERTS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

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Petitioner, Malcolm Roberts, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District entered in the above case on June 28, 1966.

OPINION BELOW

The opinion of the court below (Appendix A) is reported in 188 So.2d 392.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was filed on June 28, 1966. (Ap-

pendix A) A timely Petition for Rehearing filed on July 13, 1966 (Appendix B) was denied on July 21, 1966. (Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C.§1257(3).

QUESTION PRESENTED

Whether a defendant may constitutionally be convicted based upon a confession admitted into evidence over objection where unrebutted proof establishes a threat of physical harm by the interrogating officer in order to secure the confession.

STATUTE INVOLVED

The constitutional provision involved is U. S. Const. Amend. XIV,§1. (Appendix D)

STATEMENT

Shortly after his arrest on April 24, 1964, Petitioner gave a statement at police headquarters to the arresting officers and their supervisor implicating himself in the alleged conspiracy and larceny of which he was later convicted. (R.646-654)

The circumstances surrounding the giving of his "confession" were clearly described by Petitioner when the question of its voluntariness was heard upon objection to admission. When Petitioner refused to "discuss" the case with the arresting officer, he was taken from the interrogation area to an isolated room; told to remove his glasses, "And he told me he was going to put me through the wall unless I answered some questions on the case". (Appendix

A) Shortly, after this threat, Petitioner made his confession. Even though the officers concerned testified, Petitioner's testimony as to the threat of physical violence stands absolutely unrebutted in one thousand pages of testimony. Furthermore, while Petitioner may have been advised to secure the services of an attorney, his written statement was taken before his counsel arrived at the police station. (R.579,580,591) Going further to coercion in the taking of Petitioner's statement was his testimony of a promise of leniency in exchange for his confession implicating codefendants. (R.617,623)

Objection to the admissibility of Petitioner's pre-trial statement as unconstitutionally secured was made and sustained when proffered the first time for introduction into evidence. (R.334,355) On a subsequent proffer, the trial judge again sustained the objection to admitting the pre-trial statement of Petitioner. (R.599) When, for the third time, Petitioner's statement was offered into evidence by the State, objection was made on behalf of Petitioner. (R.638)

Lengthy argument of counsel followed, directed to whether Petitioner had been denied his right to counsel in connection with giving the pre-trial statement, as well as whether the statement was freely and voluntarily obtained. Petitioner's rights were asserted under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. (R.639,640,641) Subsequent to argument, the trial judge admitted Petitioner's confession into evidence, over strenuous objection, based on a finding that, under the evidence, Petitioner was not denied the right to counsel in connection with his confession. (R.642-645) *No mention was made by the trial judge of the unrebutted*

evidence of coercion and its affect on the free and voluntary aspect of the confession.

Thereupon, the confession of Petitioner was read in its entirety to the jury. (R.646-654) The jury returned a verdict of guilty as to Counts I and II of the Indictment—Conspiracy to Commit Grand Larceny and Grand Larceny. (R.983) Petitioner was sentenced to imprisonment in the State Penitentiary for fifteen months under Count I, and three years under Count II. (R.994) Motion for New Trial was denied. (R.985,988)

Timely appeal was lodged in the District Court of Appeal of Florida, Third District (R.997), under the provisions of Fla.Const.art.5,§5(3). The question of the invasion of Petitioner's constitutional rights under the Fourteenth Amendment to the United States Constitution by introduction into evidence of a confession not emanating from the free will of an accused was raised on the appellate level by virtue of the following Assignments of Error:

1) The trial court erred in admitting into evidence the pretrial statement of defendant, MALCOLM ROBERTS, made to the investigating officers on April 24, 1964.

2) The trial court erred in entering its adjudication of guilty against the defendant, MALCOLM ROBERTS, which adjudication of guilty was based in part upon the contents of a pretrial statement made by MALCOLM ROBERTS to investigating officers on April 24, 1964. (Appendix E)

It was vigorously argued on appeal that the State failed to sustain its burden to most clearly show that the confession introduced into evidence resulted from an unfettered exercise of will by an accused, uninfluenced by any degree of compulsion, physical or mental. While recognizing that Petitioner's testimony of a threat of physical violence to induce confession was not refuted in the record, the appellate court held such testimony not sufficient to require a determination that Petitioner's confession was involuntary because 1) the alleged threat was not accompanied by physical violence; 2) Petitioner showed every evidence of being an intelligent and well-informed person; 3) confession was made in a room in which there were several persons; and 4) Petitioner did not state he was in fear at the time of threat or confession. (Appendix A) The conviction and sentence for Conspiracy to Commit Grand Larceny was affirmed, *based upon Petitioner's confession*, as well as other evidence, while it was decided that there was not sufficient evidence to convict for Grand Larceny. (Appendix A) Timely Petition for Rehearing was filed (Appendix B) and denied. (Appendix C)

Under the Constitution of the State of Florida, this decision by the District Court of Appeal of Florida, Third District, was that of the highest court in which appeal could be had as a matter of right. Fla.Const.art.5,§4(2). Fla.Const.art.5,§5(3).

Petitioner sought to invoke discretionary review by the Supreme Court of Florida by means of a timely Petition for Writ of Certiorari, supporting brief and record. Fla.Const.art.5,§4(2); Rule 4.5c, Florida Appellate Rules. The Supreme Court of Florida declined to exercise its authority (Appendix F), and timely Petition for Rehearing

was denied by order of that Court dated May 17, 1967. (Appendix G)

REASONS FOR GRANTING THE WRIT

1. The question presented, dealing with whether a confession was involuntarily given, is of the utmost importance to the guarantee of due process of the law in the administration of criminal justice. No further elaboration on the significance of the question here involved is necessary other than reference to the words of this Court in *Davis v. North Carolina*, 384 U.S. 737, 741, 742, 16 L.Ed.2d 895,898, 86 Sup.Ct.1761 (1966):

> "It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness."

2. The decision below is in conflict with the same decision of this Court requiring retrial of a Petitioner where, "wholly apart from the disputed facts, a statement of the case from facts established in the record . . . leads plainly to the conclusion that the confessions were the product of a will overborne." *Davis v. North Carolina*, 384 U.S. 737,742, 16 L.Ed.2d 895, 898, 86 Sup.Ct. 1761 (1966). While the record here indicates a dispute as to promises of leniency to secure the confession (R.342,617,623), it is unrebutted that Petitioner was removed to an isolated place and threatened with physical violence if an inculpatory statement was not forthcoming. Petitioner's confession which immediately followed these threats was unquestionably the "product of a will overborne."

3. The decision below based in part on a finding that the threat to Petitioner was not accompanied by physical violence, is in conflict with those decisions of this Court recognizing that unconstitutional coercion can be mental as well as physical. *Chambers v. Florida*, 309 U.S. 227, 84 L.Ed. 716, 60 Sup.Ct. 472 (1940); *Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed.2d 242, 80 Sup.Ct. 274 (1960); *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 Sup.Ct. 1602, 10 A.L.R.3d 974 (1966).

4. The decision below finding Petitioner's confession to be voluntary, where there is unrebutted evidence of a threat of physical violence to secure the confession, conflicts with the decisions of this Court which find the privilege against self incrimination waived only where an accused chooses to speak in the *unfettered* exercise of his own will. *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, 84 Sup.Ct. 1489 (1964); *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 Sup.Ct. 1602, 10 A.L.R.3d, 974 (1966). No reasonable view of the record in this case permits finding Petitioner's confession to have been an unfettered exercise of his will where it was immediately preceded by a threat of physical violence, notwithstanding advice of constitutional rights by the interrogators and the intelligence of the accused.

5. The decision below disregarding Petitioner's unrebutted testimony of a threat of physical violence preceding his confession conflicts with the decision of this Court that *any evidence* of threat or trick to secure waiver of the right against self-incrimination establishes that a defendant did not voluntarily waive this privilege, and requires reversal of a conviction obtained where the confession is put in evidence. *Miranda v. Arizona*, 384 U.S. 436,

16 L.Ed.2d 694, 86 Sup.Ct. 1602, 10 A.L.R.3d 974 (1966). Furthermore, where there exists physical violence or threat of it, there is no need to weigh or measure its effect on the will of the individual victim—the confession obtained as a result thereof is invalid. *Stein v. New York*, 346 U.S. 156, 97 L.Ed. 1522, 73 Sup.Ct. 1077; reh.den., 346 U.S. 842, 98 L.Ed. 362, 74 Sup.Ct. 13 (1953).

6. The decision of the court below is erroneous and especially appropriate for review by this Court in that other than for Petitioner's illegally obtained confession, there did not exist any competent, substantial evidence to establish beyond reasonable doubt his guilt of the crime of conspiracy to commit grand larceny.

The incriminating extra-judicial declarations of Petitioner's co-defendants, made in the absence or without the knowledge of Petitioner after the alleged conspiracy had come to an end, were inadmissible in evidence to prove Petitioner's guilt. *Logan v. United States*, 144 U.S. 263, 36 L.Ed. 429, 12 Sup.Ct. 617 (1892); and cases cited, Annot., 4 A.L.R.3d 671 §3 (1965).

Only two witnesses knew of Petitioner's existence before his arrest. One testified to the fact that Petitioner made a number of phone calls to a co-defendant which she (the witness) thought to be in regard to a loan. (R.138, 145,148) Another witness identified Petitioner as having delivered a sum of money to him on the day after the crime in payment of a debt owed the witness by a co-defendant. (R.257,258,259,260)

No other witness, with the exception of the arresting and interrogating officers, knew of any connection Peti-

tioner had with the crimes with which he was charged. (R.31, 50-51,52,72,77,117,138,544,675,711,730,739,761,862-863)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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